

CARTER WOLDEN CURTIS, LLP
Kirk J. Wolden (SBN 138902)
Email: kirk@cwclawfirm.com
1111 Exposition Blvd., Suite 602
Sacramento, CA 95815
Telephone: (916) 567-1111
Facsimile: (916) 567-1112

WYLY~ROMMEL, PLLC
Sean F. Rommel (Will Seek Admission *Pro Hac Vice*)
Email: srommel@wylyrommel.com
James C. Wyly (Will Seek Admission *Pro Hac Vice*)
Email: jwyly@wylyrommel.com
4004 Texas Boulevard
Texarkana, Texas 75503
Telephone: (903) 334-8646
Facsimile: (903) 334-8645

CORY WATSON CROWDER & DEGARIS, P.C.
F. Jerome Tapley (Will Seek Admission *Pro Hac Vice*)
Email: jtapley@cwcd.com
Hirlye R. "Ryan" Lutz, III (Will Seek Admission *Pro Hac Vice*)
Email: rlutz@cwcd.com
2131 Magnolia Avenue
Birmingham, AL 35205
Telephone: (205) 328-2200
Facsimile: (205) 324-7896

Attorneys for Plaintiff and the Class

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ROBERT FREAD & RAFAEL CARRILLO,
individually and on behalf of those similarly
situated,

Plaintiffs,

v.

GOOGLE, INC.

Defendant.

**INDIVIDUAL AND CLASS
ACTION COMPLAINT**

JURY DEMANDED

Plaintiffs, ROBERT FREAD and RAFAEL CARRILLO file this INDIVIDUAL AND
CLASS ACTION COMPLAINT against Defendant Google, Inc. ("Google"), and allege the
following:

Filed

APR 29 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

Fee paid
SI (99)

CV 13-01961 HRL

BY FAX

PARTIES

1. Plaintiff, ROBERT FREAD, is a resident of Hawaii. He resides in Hau'ula, Honolulu County, Hawaii.

2. Plaintiff, RAFAEL CARRILLO, is a resident of California. He resides in Stockton, San Joaquin County, California.

3. Google, Inc. is a Delaware corporation, whose principal place of business is at 1600 Amphitheatre Parkway, Mountain View, County of Santa Clara, state of California.

JURISDICTION AND VENUE

4. Pursuant to 28 U.S.C. § 1331, this Court has original jurisdiction over the Plaintiffs' claims arising under the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 *et seq.*, a law of the United States.

5. This Court has general and specific personal jurisdiction over the Defendant because Google is a resident of California with its principal place of business located in this district.

6. Pursuant to 28 U.S.C. § 1391, venue is proper in this district because Google is a resident of this judicial district and division, and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district and division, including much of the unlawful conduct alleged herein.

NATURE OF SUIT

7. Plaintiffs bring this lawsuit against Google for the unlawful and intentional interception and use of Plaintiffs' and Class Members' electronic communications (i.e., e-mails and other personal and Federally-protected data) pursuant to their Google Apps for Education ("Google Apps EDU") accounts, which includes e-mail service through Gmail. The two types of claims at issue in this lawsuit involve "sent" and "received" e-mails. "Sent" e-mails are defined as e-mails Plaintiffs and Class Members "sent" from their Google Apps EDU accounts using Gmail. "Received" e-mails are defined as e-mails Plaintiffs and Class Members "received" through their Google Apps EDU accounts using Gmail.

///

8. Google services Plaintiffs' @hawaii.edu and @u.pacific.edu e-mail addresses through its Google Apps EDU service and Gmail. Google's intentional interception and use of Plaintiffs' Received and Sent electronic communications are in violation of the Electronic Communications Privacy Act of 1986 (the "ECPA"), 18 U.S.C. §§ 2510 *et seq.* Pursuant to Rule 23 of the *Federal Rules of Civil Procedure*, Plaintiffs assert claims against Google, individually and on behalf of a Class of all persons similarly situated with a Google Apps EDU Gmail account, for the unlawful, intentional, interception and use of their Sent and Received electronic communications.

9. Google operates an e-mail service known as "Gmail" through its "Google Apps for Education" web-application service. Through "Google Apps for Education," Google contracts with educational organizations throughout the United States to service e-mail accounts for students, faculty, staff, alumni, and members of these organizations. Google services these Google Apps EDU accounts with Gmail. In contrast to regular Gmail users, however, Google does not serve targeted content-based advertising to Google Apps EDU users. Google nonetheless extracts the content and meaning from Plaintiffs' and Class Members' Sent and Received e-mail messages and uses that content for various purposes and for profit.

10. Using multiple devices, Google intercepts the content and meaning of all Plaintiffs' and Class Members' Sent and Received electronic communications while those e-mails are in transit to the recipient. Google then uses the information and content obtained from the unlawful interception for multiple undisclosed purposes and for profit. This process, in whole or in part, shall be referred to generally throughout this Complaint as Google's "E-mail Content Extraction Process."

11. Google reads Plaintiffs' and Class members' Received and Sent e-mails.

12. Google reads Plaintiffs' and Class members' Received and Sent e-mails to collect, create, and generate additional information such as metadata.

13. From this reading, Google collects "keywords" from Plaintiff's and Class Members' email messages.

///

1 14. From this reading, Google collects, extracts, and/or generates metadata
2 consisting of "PHIL Clusters" (Probabilistic Hierarchical Inferential Learner). "PHIL Clusters"
3 represent the meaning inferred from particular words or phrases in Plaintiffs' and the Class'
4 Received and Sent e-mails.

5 15. Systems such as PHIL, or similar systems, learn "concepts" by learning an
6 explanatory model of text.

7 16. Thus, Google's use of PHIL's concepts are designed and supposed to model the
8 *actual ideas* that occur in Plaintiff's and Class members' mind in creating e-mail content.

9 17. From its reading, Google collects, extracts, and/or generates other types of data
10 and metadata.

11 18. Google's reading the content of e-mails to generate "PHIL clusters," including
12 those of Plaintiffs and the Class, allow Google to ascertain any information concerning the
13 substance, purport, or meaning of the email for Google's intended and actual use.

14 19. From the information intercepted from, *inter alia*, Plaintiffs' and Class members'
15 e-mails and then read, Google creates and then uses "external e-mail information," for various
16 purposes which include, but are not limited to, topics or concepts derived using the text of the e-
17 mail, topics or concepts derived using an e-mail attachment, and information based upon a
18 user's or sender's profile.

19 20. Google uses Google Apps EDU as the quintessential "Trojan horse." Schools
20 are encouraged to use Google Apps EDU and Google offers Gmail under the guise that the
21 message content will not be processed by Google's advertising systems. Once Google obtains
22 the school contract, Google unlawfully acquires and collects data from Plaintiffs' and Class
23 Members' email messages. While certain limitations exist within the Google Apps EDU
24 contract, Google non-the-less uses the unlawfully collected data outside the Google Apps EDU
25 services. Accordingly, where Google contractually limits its acquisition of data through the
26 Google Apps EDU contracts, it actually collects data, and then uses the acquired data outside
27 the Google Apps EDU service.

28 ///

21. Plaintiffs have standing to bring this action because: (1) Plaintiffs have been and continue to be injured in fact by Google's invasion of privacy through Google's E-mail Content Extraction Process, which Process in multiple ways through the use of multiple devices, violates the ECPA including 18 U.S.C. § 2511(1)(a) (interception) and 18 U.S.C. § 2511(1)(d) (use); (2) Plaintiffs' injuries are real and actual, and the result of Google's ECPA violations in that Plaintiffs have verified Google's common and serial use of its E-mail Content Extraction Process; (3) the injury is directly attributable to Google's Content Extraction Process, which Process violates the ECPA; (4) Google derives a financial windfall and avoids traffic acquisition costs from its E-mail Content Extraction Process; and, (5) in the event of a favorable decision, ECPA provides Plaintiffs a concrete redress for their harm, including statutory damages and injunctive relief.

STATEMENT OF FACTS

Google Apps EDU – Class Allegations

22. "Gmail" is an electronic communication service operated by Google with over 400 million registered accounts globally.

23. Google offers a service known as "Google Apps for Education" (sometimes referenced as "Google Apps Education Edition") ("Google Apps EDU").

24. Through Google Apps EDU, Google contracts with educational institutions/organizations to provide Gmail for students, faculty, staff, and other members. However, the Gmail accounts assigned to the Google Apps EDU users: (1) do not have @gmail.com addresses; and (2) do not receive targeted advertisements.

25. Google's Apps EDU program has been offered to University of Hawaii, University of the Pacific and thousands of other educational institutions throughout the United States through the use of a uniform written contract to which Google requires all participating institutions/organizations to agree and accept. The Google Apps EDU Contract which Google uses is essentially a form contract analogous to and containing the same relevant and material terms, conditions and disclosures in each instance of use. These analogous Google Apps EDU contracts include, *inter alia*, provisions regarding: (1) Google's targeted advertising being

1 limited to only alumni; and (2) Google's performance under the contracts purporting to comply
2 with FERPA by virtue of Google's false and fraudulent description and designation of Google
3 as a "school official" in the contracts.

4 26. Through its Google Apps EDU contracts with University of Hawaii, University
5 of the Pacific and thousands of other educational institutions/organizations throughout the
6 United States, Google has forced the migration of hundreds of thousands and likely millions of
7 existing dedicated education institution/organization student, faculty and staff e-mail accounts,
8 like Fread's @uhawaii.edu and Carrillo's @u.pacific.edu accounts, to Gmail. As new students,
9 faculty and staff join these educational institutions/organizations throughout the United States,
10 these individuals are forced and required to open dedicated Gmail accounts.

11 27. Plaintiffs and Class members' Google Apps EDU Gmail accounts are subjected
12 to Google's E-mail Content Extraction Process, wherein Google unlawfully intercepts and uses
13 the content and meaning of plaintiffs' and the Class' Sent and Received e-mail communications.

14 28. Google does not display targeted advertising to Plaintiffs' and the Class
15 members' email accounts. Yet, Google unlawfully collects the same information from
16 Plaintiffs' and Class Members' email messages.

17 29. Google's E-mail Content Extraction Process is separate and distinct from, and
18 independent of, necessary spam filtering, anti-virus protection, or malware detection. Google
19 can offer its Google Apps EDU service without intercepting or using Plaintiffs' and the Class
20 members' Received and Sent e-mail through its E-mail Content Extraction Process. Google's
21 acquisition and use of content from Plaintiffs' and the Class members' Sent and Received e-
22 mail is not a necessary incident to the protection of the rights of Google. The industry standard
23 for webmail electronic communication services does not include the interception and/or use of
24 the content of e-mail like Google does. For example, neither Yahoo nor Outlook engages in
25 the interception or use of the content of personal, non-commercial e-mail.

26 ///

27 ///

28 ///

1 30. Google enriches itself and profits through the use of data intercepted and
2 extracted from Google Apps EDU users, including data unlawfully obtained from the
3 interception and use of Google Apps EDU users' Sent and Received e-mail. This data is
4 valuable to Google. Google openly claims to investors that there is monetary value in such
5 data, and regularly pays others for what it refers to as "traffic acquisition costs." Through the
6 use of its E-mail Content Extraction Process, Google is able to avoid the payment of otherwise
7 costly "traffic acquisition costs."

8 31. Google engages in its E-mail Content Extraction Process without the consent of
9 Plaintiffs and the Class, and otherwise without disclosing this Process to its Google Apps EDU
10 "partners," and/or Plaintiffs or the Class.

11 32. The Google Apps EDU Terms of Service do not contain information or
12 disclosures sufficient to obtain Plaintiffs' or Class members' consent under the ECPA. The
13 Google Apps EDU Terms of Service contains an integration clause. Google's Gmail Terms of
14 Service, Privacy Policy, Legal Notice and Program Policy do not include information or
15 disclosure sufficient to obtain Plaintiffs' or Class members' consent under the ECPA. The
16 Gmail Terms of Service contains an integration clause.

17 33. Section 10.1 of the Google Apps EDU contract with the University of Hawaii
18 contains a provision which reads: "To the extent that Google has access to 'Education Records,'
19 it is deemed a 'school official,' as each of these terms is defined under FERPA, under this
20 Agreement and will comply with its obligations under FERPA." Plaintiffs are informed and
21 believe that this provision is a uniform, standard provision in all of Google's Apps EDU
22 contracts. By this contract provision, Google purports to comply with FERPA based on
23 Google's contractual designation of itself as a "school official." Google cannot lawfully be a
24 "school official" within the meaning of FERPA, and cannot comply with FERPA's obligations
25 by designating itself a "school official" in its Google EDU Apps contracts. Google is not a
26 "school official" or "staff member" under FERPA, and does not have a "legitimate educational
27 interest" in accessing educational records under FERPA. Google violates FERPA through its
28 interception and use of Plaintiffs' and Class members' Received and Sent e-mail through its

1 Content Extraction Process.

2 34. Due to the success of Google's Apps EDU program, Google is now by far the
3 most common provider of outsourced email in higher education.

4 **Experiences of Class Members Fread and Carrillo**

5 ***Plaintiff Robert Fread***

6 35. Plaintiff Robert Fread is a student at the University of Hawaii; his home campus
7 has been Windward Community College but he has also attended classes at the University of
8 Hawaii at Mānoa. He has been a student of the University of Hawaii continuously since
9 January 2011.

10 36. The University of Hawaii's migration of its e-mail services to Google Apps EDU
11 began in 2009, when the University investigated the possibility of contracting out its e-mail
12 services for its students, faculty, and staff.

13 37. On June 21, 2010, Google contracted with the University of Hawaii ("the
14 University," or "UH") to provide exclusive e-mail services for all of the UH's students, faculty,
15 and staff. Google's contract with the University is titled "Google Apps Education Edition
16 Agreement" ("Agreement"), stamped "Google Apps Edu Agreement 031809." ("UH Google
17 Apps EDU Contract") Plaintiff Fread is informed and believes that the UH Google Apps EDU
18 Contract is essentially a form contract analogous to and containing the same relevant and
19 material terms, conditions and disclosures a multitude of other Google App EDU contracts
20 Google has entered into throughout the United States including, e.g. with the University of the
21 Pacific, and the California State University and University of California systems. These
22 analogous Google Apps EDU contracts include, *inter alia*, provisions regarding: (1) Google's
23 targeted advertising being limited to only alumni; and (2) Google's performance under the
24 contracts purporting to comply with FERPA by virtue of Google's false and fraudulent
25 description and designation of Google as a "school official" via a defined term in the contracts.

26 38. Through the UH Google Apps ECU Contract, Google services the
27 "@hawaii.edu" email accounts provided to all students, faculty, and staff of UH, including
28 plaintiff Fread.

39. @hawaii.edu is the official—and often exclusive—form of communication by and to UH for UH's students, faculty, and staff.

40. In May of 2011, the University sent emails to @hawaii.edu account holders informing them of the forced migration of their e-mail service to Google Apps EDU.

41. On September 12, 2011, Fread received notice that his student e-mail account would migrate to Google Apps EDU on September 24, 2011, without his consent.

42. On January 4, 2012, UH's IT department informed Fread that his e-mail account would migrate to Google Apps EDU against his will on January 24th, 2012.

43. On July 23, 2012, Fread's @hawaii.edu email account was migrated to a Google Apps EDU account without his consent. For months, Fread refused to use his Google Apps EDU email account but later Fread was forced to use the account in order to send and receive official UH communications.

Plaintiff Rafael Carrillo

44. In or about 2010, University of the Pacific ("UOP") located in Stockton, California entered into a contract with Google through which Google agreed to provide e-mail services on behalf of UOP through its Google Apps for Education program ("UOP Google Apps EDU Contract"). McGeorge School of Law is part of UOP. The UOP Google Apps EDU Contract applies to all UOP students, faculty, administrative staff, and alumni, including those affiliated with McGeorge.

45. Plaintiff Carrillo is informed and believes that the Google Apps EDU Contract is essentially a form contract analogous to and containing the same relevant and material terms, conditions and disclosures a multitude of other Google App EDU contracts Google has entered into throughout the United States including, by way of example only, contracts with the UH, and California State University and University of California systems. These analogous Google Apps EDU contracts include, *inter alia*, provisions regarding: (1) Google's targeted advertising being limited to only alumni; and (2) Google's performance under the contracts purporting to comply with FERPA by virtue of Google's false and fraudulent description and designation of Google as a "school official" via a defined term in the contracts.

1 46. Plaintiff Carrillo is informed and believes that at no time before or after entering
2 into the UOP Google Apps EDU Contract has Google disclosed or otherwise notified UOP of
3 Google's Content Extraction Process to which it subjects all UOP student, faculty, administrative
4 staff and alumni e-mail RECEIVED by or SENT to @u.pacific.edu accounts.

5 47. Prior to the time performance of the UOP Google Apps EDU Contract began, all
6 existing UOP students, faculty, administrative staff and alumni received all communications
7 from UOP and communicated with UOP through @u.pacific.edu accounts. Plaintiff Carrillo is
8 informed and believes the UOP email system which supported @u.pacific.edu e-mail accounts
9 was operated by UOP itself using a Novell Group Wise platform or server. At the time
10 performance of the UOP Google Apps EDU Contract began, all UOP students, faculty,
11 administrative staff and alumni were subjected to a forced migration of their @u.pacific.edu
12 accounts from this then existing system to Google's Gmail service.

13 48. This forced migration required all UOP students, faculty, administrative staff and
14 alumni, including Carrillo, to follow a series of prompts which led them through the migration
15 process. These prompts involved access to a "Welcome to Your New Account" page which
16 included terms and conditions and a privacy policy. The instructions called for the individual to
17 enter a word in a box and click on something which said words to the effect "I accept" and
18 "continue with my account." Since Google has been providing its e-mail service to UOP
19 through the UOP Google Apps EDU Contract, new students have been required to open Google
20 serviced @u.pacific.edu accounts through this same process as a condition of their application or
21 enrollment process. Faculty and administrative staff have been required to do the same as part
22 of their employment process.

23 49. Plaintiff Rafael Carrillo attended McGeorge School of Law from August 2009
24 until his graduation in May 2012. While he attended McGeorge, Plaintiff was required to
25 maintain a @u.pacific.edu e-mail account through which he Received all official
26 communications from UOP and McGeorge, and through which he has sent all official e-mail to
27 UOP and McGeorge relating to his enrollment.

28 ///

1 50. In furtherance of the UOP Google Apps Contract, Plaintiff Carrillo was forced to
2 migrate his @pacific.edu account in the manner described above.

3 51. Until very recently, Plaintiff Carrillo had no idea that in migrating his
4 @pacific.edu account, as required, he was creating what was in reality a Gmail account.

5 52. Plaintiff did not consent to Google's Content Extraction Process and would not
6 have consented had he been made aware of that process at the time he signed up and created his
7 @u.pacific.edu account, or thereafter.

8 53. After the forced migration of his @pacific.edu account, Plaintiff Carrillo received
9 communications from UOP and others sent to this account to his @u.pacific.edu address. These
10 Received electronic communications subjected to Google's Content Extraction Process included
11 the interception and use of content containing, *inter alia*, educational and financial information
12 which plaintiff is informed and believes is private, confidential and protected from disclosure
13 under federal law including FERPA. Carrillo also Sent e-mail from his @u.pacific.edu account
14 which was subjected to Google's Content Extraction Process.

15 54. Plaintiff Carrillo never received Google advertising in his @u.pacific.edu
16 mailbox.

17 55. Google intercepts, reads, acquires, and uses the content of Plaintiffs' and Class
18 Members' "sent" and "received" electronic communication to lower or avoid its "traffic
19 acquisition costs," as defined by Google on page 32 of its 10K filed with the Securities
20 Exchange Commission for the year ending December 31, 2010. Because Google has no right or
21 license to intercept and use the Plaintiffs' and Class Members' "sent" and "received" email data,
22 Google obtains the information for free in contrast to the acquisition of data for which it
23 compensates third parties in recognized programs.

24 ///

25 ///

26 ///

27 ///

28 ///

CLASS ALLEGATIONS

56. Plaintiffs bring this class action, pursuant to Rule 23(a) and (b)(3) of the *Federal Rules of Civil Procedure*, individually and on behalf of all members of the following Class:

All Google Apps for Education users who, through their Google Apps for Education e-mail account, have Sent or Received e-mail messages up through and including the date of class certification.

a. Excluded from the class are the following individuals and/or entities:

i. Any and all federal, state, or local governments, including but not limited to their department, agencies, divisions, bureaus, boards, sections, groups, counsels, and/or subdivisions;

ii. Individuals, if any, who timely opt out of this proceeding using the correct protocol for opting out;

iii. Current or former employees of Google;

iv. Individuals, if any, who have previously settled or compromised claims(s) as identified herein for the Class; and,

v. Any currently sitting federal judge and/or person within the third degree of consanguinity to any federal judge.

A. Ascertainability

57. The Class is objectively defined.

58. The Class is ascertainable.

59. A Google Apps EDU user can be identified through the corresponding Google Apps EDU account, by either Google or the institution which has entered into a Google Apps EDU contract with Google. As such, direct notice can be given to the Class Member *via* email and/or direct mail.

60. The Google Apps EDU accounts contain readily identifiable information as to the account user.

61. Upon Court-approved notice, any Class Member who desires to seek actual damages pursuant to 28 U.S.C. § 2520(C)(2)(a) may opt-out or remain in the Class and be bound by the remedies and results.

1 **B. Numerosity**

2 62. The Class is so numerous that joinder of all members is impracticable and the
3 Class Members are from multiple states.

4 63. The number of Google Apps EDU users which comprise the Class exceeds
5 100,000 persons.

6 **C. Commonality**

7 64. There are questions of law or fact common to the class. These questions include,
8 but are not limited to, the following:

9 a. Whether Google intentionally intercepted, endeavored to intercept, or
10 procured any other person to intercept or endeavor to intercept the Plaintiffs' and Class
11 Members' Sent and Received electronic communications through its E-mail Content
12 Extraction Process. Inclusive in this common question(s) are the common questions
13 regarding the elements of 18 U.S.C. § 2511(1)(a) and § 2520 based upon the statutory
14 definitions:

15 i. Whether the Plaintiffs' and Class Members' "sent" and "received"
16 emails were electronic communications;

17 ii. Whether Google used an electronic, mechanical, or other device;

18 iii. Whether Google acquired any content of Plaintiffs' and Class
19 Members' Sent and/or Received e-mails;

20 iv. Whether that content amounted to any information concerning the
21 substance, purport, or meaning of the e-mails;

22 v. Whether Google acted intentionally;

23 vi. Whether Class members consented to Google's interception and
24 use of their e-mail contents;

25 vii. Whether class members can give valid consent given the illegal
26 nature of Google's conduct under federal law;

27 vi. Whether statutory damages against Google should be assessed;
28 and,

1 vii. Whether injunctive and declaratory relief against Google should
2 be issued.

3 b. Whether Google intentionally used, or endeavored to use, the contents of
4 Plaintiffs' and Class Members' Sent and Received electronic communications derived
5 through its E-mail Content Extraction Process knowing or having reason to know that
6 Google obtained the information through the interception of the electronic
7 communication in violation of 28 U.S.C. § 2511(1). Inclusive in this common
8 question(s) are the common questions regarding the elements of 18 U.S.C. § 2511(1)(d)
9 and § 2520 and based upon the statutory definitions:

10 i. Whether the Plaintiffs' and Class Members' Sent and Received e-
11 mails were electronic communications;

12 ii. Whether Google used an electronic, mechanical, or other device;

13 iii. Whether Google acquired any content of Plaintiffs' and Class
14 Members' Sent and/or Received e-mails;

15 iv. Whether that content amounted to any information concerning the
16 substance, purport, or meaning of the e-mails;

17 v. Whether Google used the acquired content of e-mails;

18 vi. Whether Google acted intentionally;

19 vii. Whether Class members consented to Google's use of Sent and/or
20 Received e-mail;

21 viii. Whether Class members can give valid consent given the illegal
22 nature of Google's conduct under federal law;

23 ix. Whether statutory damages against Google should be assessed;
24 and,

25 x. Whether injunctive and declaratory relief against Google should
26 be issued.

27 ///

28 ///

D. Typicality

65. Plaintiffs' claims are typical of the claims of the Class in that Plaintiffs and the Class are Google Apps EDU users, and: (1) Plaintiffs and Class Members' Sent and/or Received e-mails through their Google Apps EDU accounts;(2) Google intercepted and/or endeavored to intercept and acquired the e-mails' content;(3) Google used or endeavored to use the e-mails' content;(4) neither Plaintiffs nor the Class consented to Google's interception and uses of the e-mails' content; (5) the Google Apps EDU contracts which require and obligate Plaintiffs' and Class Members' affected e-mail accounts to be subjected to Google's Content Extraction Process are uniform, and contain the same relevant and material terms, conditions and disclosures; and,(6) Plaintiffs and the Class Members are entitled to declaratory relief, statutory damages, and injunctive relief as a result of Google's unlawful conduct.

E. Adequacy of Representation

66. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs' interests do not conflict with the interests of the Class Members. Furthermore, Plaintiffs have retained competent counsel experienced in class action and privacy litigation. Plaintiffs' Counsel will fairly and adequately protect and represent the interests of the Class.

F. Superiority

67. Pursuant to Fed. R. Civ. P. 23(b)(3), questions of law or fact common to the Class Members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Given the uniformity of Google's conduct *vis a vis* Plaintiffs and Class members which is alleged to violate the ECPA, class treatment is manageable as to the legal issues and facts presented. Given the small amount in controversy as to each Class member, and the fact that Google conceals the true nature and extent of the their E-mail Content Extraction Process from its Google Apps EDU partners and the Class, the class action procedure provides the only real, viable procedural mechanism for the litigation of the important claims described herein.

///

///

CAUSE OF ACTION—VIOLATIONS OF 18 U.S.C. §§ 2510 et seq.

68. Plaintiffs adopt and incorporate each and every allegation of this Complaint as if stated fully herein.

69. Google, as a corporation, is a “person” pursuant to 18 U.S.C. § 2510(6).

70. Google’s actions in violation of the ECPA were and remain intentional.

71. Google’s actions affect interstate commerce in that: (1) Plaintiffs are residents of Hawaii and California, Sent and Received e-mail in Hawaii and California, and locations outside of Hawaii and California; and, (2) Plaintiffs’ use of their Google Apps EDU accounts occurred both within and outside of the States of Hawaii and California.

72. Pursuant to 18 U.S.C. § 2511(1)(a), Google intentionally intercepted, intercepts, or endeavored or endeavors to intercept Plaintiffs’ and the Class Members’ Sent and Received e-mail through the use of its E-mail Content Extraction Process based on the following:

a. Google acquired(s) the content of: (1) Plaintiffs’ and Class Members’ Sent and Received e-mails;

b. Plaintiffs’ and Class Members’ Sent and Received e-mails are electronic communications;

c. Google utilized(s) one or more devices composing of an electronic, mechanical or other device or apparatus to intercept and use the electronic communications through its E-mail Content Extraction Process;

d. Google does not furnish the devices to Gmail or Google Apps EDU users, and users do not use the devices for connection to the facilities;

e. The devices are not used by Google, if operating as an electronic communication service, in the ordinary course of its business as a provider of an electronic communication service; and,

f. Google’s interception of Plaintiffs’ and Class Members’ Sent and Received electronic communications are: (a) for undisclosed purposes; (b) for the purpose of delivering targeted advertising and other for profit uses; (c) for purposes beyond the Service of Gmail; (d) in violation of its form user agreements; (e) in

1 violation of its uniform written disclosures to users; (f) in violation of its Gmail Apps
2 EDU contracts with the University of Hawaii, UOP, and other Google Apps EDU
3 institutions; (g) in violation of the Federal Education and Rights to Privacy Act
4 (“FERPA”); and, (h) not within the ordinary course of business of a provider of an
5 electronic communication service.

6 73. Pursuant to 18 U.S.C. § 2511(1)(d), Google intentionally used, uses, or
7 endeavored or endeavors to use the contents of Plaintiffs’ and Class Members’ Sent and
8 Received electronic communications it obtained through its E-mail Content Extraction Process
9 while knowing or having reason to know that Google obtained the information through the
10 interception of the electronic communication in violation of 18 U.S.C. § 2511(1)(a).

11 74. Google’s interception of and use of the content of Plaintiffs’ and Class
12 Members’ Sent and Received electronic communications through its E-mail Content Extraction
13 Process was not performed by an employee while engaged in any activity which is necessary
14 incident to the rendition of Gmail or necessary for the protection of the rights or property of
15 Google.

16 75. No party to Plaintiffs’ and Class Members’ Sent and Received electronic
17 communications subject to its E-mail Content Extraction Process consents[ed] to Google’s
18 interception or use of the contents of the electronic communications.

19 76. Google intercepts[ed] Plaintiffs’ and Class Members’ Sent or Received e-mails
20 pursuant to its E-mail Content Extraction Process for the purpose of committing a criminal
21 and/or tortious act in violation of federal and state laws, and as such, Google cannot obtain
22 consent. 18 U.S.C. § 2511(2)(d).

23 77. “Gmail” is an “electronic communication service” (as defined by 28 U.S.C. §
24 2510(15)).

25 78. Google Apps users, including Google Apps EDU users, who send and receive
26 emails through Gmail are “user(s)” pursuant to 28 U.S.C. § 2510(13). A Gmail “user” (as
27 defined by 28 U.S.C. § 2510(13)) receives Gmail through a Gmail or Google Apps EDU
28 account.

79. Google's interception and use of content of Plaintiffs' and Class Members' Received and Sent electronic communications through the use of its E-mail Content Extraction Process is not within the ordinary course of business of an electronic communication service.

80. As a result of Google's violations of § 2511, pursuant to § 2520, Plaintiffs and Class Members are entitled to:

- a. Preliminary and permanent injunctive relief to end Google's violations;
- b. Appropriate declaratory relief;
- c. For Plaintiff and each Class Members, the greater of either (1) \$100 a day for each day of violation, or, (2) \$10,000; and,
- d. Reasonable attorneys' fees and other litigation costs reasonably incurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all Class Members, request judgment against Google and the following relief:

1. An order certifying the Class and appointing Plaintiffs and their Counsel to represent the Class;
2. Judgment against Google under all causes of action;
3. Appropriate declaratory relief against Google;
4. Preliminary and permanent injunctive relief against Google;
5. An award of statutory damages to the Plaintiffs and Class Members, for each, the greater of \$100 a day for each day of violation or \$10,000, whichever is greater;
6. An award of reasonable attorneys' fees and other litigation costs reasonably incurred; and,
7. Any and all other relief to which the Plaintiffs and Class Members may be entitled.

///

///

///

JURY DEMAND

Plaintiffs demands on all claims, causes of action, and remedies pursued by this Complaint.

Dated: April 29, 2013

Respectfully submitted,

By: /s/ Kirk J. Wolden

Kirk J. Wolden (SBN 138902)
Email: kirk@cwclawfirm.com
CARTER WOLDEN CURTIS, LLP
1111 Exposition Blvd., Suite 602
Sacramento, CA 95815
Telephone: (916) 567-1111
Facsimile: (916) 567-1112

WYLY~ROMMEL, PLLC
Sean F. Rommel (Will Seek Admission *Pro Hac Vice*)
Email: srommel@wylyrommel.com
James C. Wyly (Will Seek Admission *Pro Hac Vice*)
Email: jwyly@wylyrommel.com
4004 Texas Boulevard
Texarkana, Texas 75503
Telephone: (903) 334-8646
Facsimile: (903) 334-8645

CORY WATSON CROWDER & DEGARIS, P.C.
F. Jerome Tapley (Will Seek Admission *Pro Hac Vice*)
Email: jtapley@cwcd.com
Hirlye R. "Ryan" Lutz, III (Will Seek Admission *Pro Hac Vice*)
Email: rlutz@cwcd.com
2131 Magnolia Avenue
Birmingham, AL 35205
Telephone: (205) 328-2200
Facsimile: (205) 324-7896
A Professional Law Corporation

GILL ELROD RAGON OWEN
& SHERMAN, P.A.
Chris Travis (Will Seek Admission *Pro Hac Vice*)
Email: Travis@gill-law.com
Drake Mann (Will Seek Admission *Pro Hac Vice*)
Email: mann@gill-law.com
425 West Capitol Avenue, Suite 3801
Little Rock, Arkansas 72201
Telephone: (501) 376-3800
Facsimile: (501) 372-3359

1 THE TRAMMELL LAW FIRM, PLLC
2 M. Chad Trammell (Will Seek Admission *Pro Hac*
3 *Vice*)
4 Email: chad@thetrammellfirm.com
5 418 North State Line Avenue
6 Texarkana, AR 71854
7 (870) 779-1860 (Telephone)
8 (870) 779-1861 (Fax)

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28 Attorneys for Plaintiffs and the Class